SUPREME COURT, U. S.
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Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1974

No. 74-306

PASSAIC VALLEY WATER COMMISSION, a public body of the State of New Jersey, for itself and on behalf of the CITIES OF PATERSON, PASSAIC, AND CLIFTON in the State of New Jersey,

Petitioner,

vs.

STATE OF NEW JERSEY, *Ex Rel* DEPARTMENT OF HEALTH, NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION and CITY OF NEWARK in the State of New Jersey,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIORCOURT OF NEW JERSEY, APPELLATE DIVISION

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Respondent, North Jersey District Water Supply Commission ("North Jersey"), a public agency of the State of New Jersey, respectfully prays that the petition for a Writ of *Certiorari* of petitioner, Passaic Valley Water Commission, be denied.

COUNTERSTATEMENT OF JURISDICTION

This matter is concerned exclusively with issues of a political and policy nature, only implicating the laws of the State of New Jersey and only of concern to the citizens of that State. In contention are State statutes and their proper interpretation under State law. No substantial federal questions are raised by the Petition. Therefore, the jurisdiction of this Court under 28 U.S.C. §1257(3) is not properly invoked.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The only questions which have been before the courts in this matter are those questions set forth in the opinion of Appellate Division, Superior Court of New Jersey. (See "Appendix A," p. 4a)

COUNTERSTATEMENT OF THE CASE

The reasonableness and feasibility of the Wanaque Plan judged only from the standpoint of its cost and utility to member-municipalities is beyond dispute and no substantial public question relating thereto is raised by the petition

The Petition for Certiorari now before this Court is frivolous. It raises no substantial federal questions. Moreover, one can hardly overlook the fact that it is the delay attending petitioner's prosecution of this litigation, by raising the cost of the project from $11.6 million to $22 million due to inflation, rather than the persuasiveness of petitioner arguments which bodes as more likely to prevent the consummation of the Wanaque project.

Stripped of hyperbole, petitioner's argument in this litigation has been that the Wanaque plan is unjustifiable and unreasonable in comparison with the multiple filtration plant scheme it suggests, when viewed solely on the basis of the interests the member municipalities of respondent, North Jersey District Water Supply Commission ("North Jersey"), and only become reasonable when statewide interests are factored in. Even a cursory review of the largely uncontroverted evidence developed before the trial court will demonstrate conclusively that a comparison of the benefits accruing solely to the membership of North Jersey as a *whole* under Wanaque plan, versus the benefits of an upgrading Passaic Valley's plant and construction of a new plant at Little Falls, overwhelmingly favors the Wanaque plan.

From a strict dollars and cents standpoint, filtered water from Wanaque would cost all of the members of North Jersey $39 per million gallons, whereas, if a filtration plant were to be built at Little Falls, excluding the Passaic Valley municipalities, the cost to other members of North Jersey would be $72 per million gallons. Indeed, the annual cost of operating the 100 mgd Wanaque plant for all of the members of North Jersey would be $1,423,500 while it would cost up to $2,179,073 to operate the 67 mgd Little Falls plant for only the non-Passaic Valley members of North Jersey (1T323-3 to 12). At the same time, assuming that pre-treatment would be required in addition to an overall upgrading of Passaic Valley's plant, the annual cost to it of participating in the Wanaque plan would be equal to, or even less than "going it alone" (1T323-8 to 12). In other words, it would cost everybody

else twice as much were Passaic Valley allowed to abort the Wanaque plan, while it would cost Passaic Valley little or nothing more to participate in the Wanaque plan.

On the other hand, if the plant were to be built at Wanaque, North Jersey could sell its filtered surplus to non-member towns adjacent to its aqueduct and thereby reduce the cost of water to its membership as a whole. On the other hand, the really motivation for petitioner in bringing this litigation has been that if North Jersey's plant were built at Little Falls, only petitioner would have filtered water to offer these towns, and Passaic, Clifton and Paterson alone of the members of North Jersey, would profit from sales to non-members along the aqueduct. In other words, petitioner wants a monopoly. When the possibility that non-members of North Jersey will use Wanaque water, as they do now, whether filtered at Wanaque or filtered at Passaic Valley's plant is considered, it again becomes plain that in terms of interests of the ownership of North Jersey as a whole, the Wanaque plant is infinitely preferable.

The Wanaque plan also offers intangible advantages to the whole membership of North Jersey which cannot be otherwise duplicated. A Wanaque filtration plant would make possible augmentation of the North Jersey water supply with filtered water from Pequannock and Jersey City in the event of drought. (IT229-1 to 230-13). A Wanaque plant would offer increased output per man-hour and decreased energy consumption (a factor which has assumed greater importance since the trial), due to the maximized "head" available at the reservoir. (IT167-12 to 168-21).

On the basis of the foregoing, it is clear beyond cavil that the advantages and merits of Wanaque plan, viewed only from the standpoint of all of the owners of North Jersey, far outstrip those of any alternative proposal. Therefore, it is respectfully suggested that certainly no substantial federal question exists regarding the reasonableness or feasibility of the Wanaque filtration plant plan as would require review by this Court.

The basic argument petitioner has offered is that North Jersey was chartered as, and must act only as the exclusive servant of its owner municipalities; and further, that in formulating any plan, North Jersey is bound to act only upon the basis of, and in strict deference to the narrow interests of its owners alone to the exclusion, or in disregard of, the interests of other municipalities, or the State as a whole. Petitioner has contended that the plan

approved below would force the Passaic Valley municipalities and the other owners of North Jersey to subsidize intended or inevitable benefits conducing only to municipalities other than the owners of North Jersey. In this Court petitioner has attempted to give these arguments some constitutional coloration.

In effect, petitioner has argued only that the State and North Jersey have exceeded their state statutory limitations and penalized local municipalities in an arbitrary manner. The point petitioner has tried to make is that it is being asked to subsidize benefits for non-owner municipalities whose interests North Jersey has no right to consider in formulating its filtration plant plan. Following this logic, "economic unfeasibility" and "financial disaster" are equated with "an excessive or unreasonable cost," which apparently means any difference in the cost per gallon to Passaic Valley due to upgrading the system as proposed by North Jersey and the supposed cost per gallon to Passaic Valley of upgrading its old plant, assuming that this could be done.

In essence, petitioner now would argue that because of a possible savings to Passaic Valley from "going it alone," petitioner has a constitutional right to attempt to upgrade its existing plant for its exclusive use in the hope of duplicating the performance offered by the Wanaque plant for all members of North Jersey: it being of no consequence that petitioner's refusal to participate in the Wanaque plan would disserve State water policy and force North Jersey to build the plant at Little Falls at double the operating cost to the remaining members of North Jersey. See (1T30-3 to 15; 30-20 *et. seq.*)

Both statute and case law place beyond argument the fact that *North Jersey is not the exclusive servant of its owners.* Its stewardship runs to the water needs of the entire North Jersey water supply district. Further, a reading of *City of Bayonne vs. N.J.D.W.S. Comm.*, 30 *N.J. Super* 409 (App. Div. 1954) in tandem with *N.J.S.A.* 58:5-1 *et. seq.*, will dispell any concern that the members of North Jersey are to underwrite the implementation of benefits designed to conduce only to municipalities now outside the North Jersey compact.

North Jersey's "statutory and fiduciary" obligations extend not only to its owner municipalities, but also to all those other municipalities which may be entitled to share in its water supply: namely, any other municipality in the North Jersey water supply district. See *N.J.S.A.* 58:5-9 to 15.

A necessary corollary to the statutory protection of the

rights of non-owners, and the statutorily mandated public trusteeship North Jersey holds for them, must be a factoring of their needs and interests into the formulation of any plans to expand, acquire, construct or improve North Jersey's water supply system. See *N.J.S.A.* 58:5-12. Even more clearly, North Jersey's plans cannot be divorced from, but in fact must implement or at least be in harmony with "statewide water policy."

An examination of the statutory provisions which established North Jersey, *N.J.S.A.* 58:5-1, *et. seq.*, reveals the notion the Petition conjures up of North Jersey's owners underwriting the costs of projects which will only be of benefit to others is chimerical.

N.J.S.A. 58:5-23 provides that:

> "After the actual completion of the plant and the commencement of the actual supply of water from there, the expenses of the commission...shall be charged to operation and properly proportioned as between the several water supply projects which may be operated by the commission.
>
> ...In apportioning said cost [of the plant], no municipality shall be charged with any item of interest or rental upon, or cost of operation of, any part of any water plant which is not used in supplying water to municipality."

In other words, Petitioner, by statute is guaranteed that it will not be made to bear the cost of financing, rental, or operation "of any part of any water plant" which is not used to supply water to its members, although North Jersey, by statute may be bound to provide such part for non-owners. To the extent they are the beneficiaries of such parts of a plant, new or non-owners must bear the costs relating thereto.

As far as the costs of operation, any incremental costs incurred as a result of water being made available to new owners or non-members of North Jersey would be borne by those municipalities. More likely, the inclusion of non-members (or new owners) would serve to reduce the costs of North Jersey water to present-member municipalities, with the savings returned to them.

Thus, at worst, petitioner would bear only its fair share of the costs of operating any facilities used for supplying it with water. More probably, as the statute envisions, Passaic Valley and the

other present owners, in effect, stand to get a greater return for their water-dollar, precisely because the Wanaque plan, unlike the Little Falls plan of Passaic Valley, does have utility in meeting the future needs of all of the municipalities in the North Jersey district. (1T324-7 to 24).

Likewise with respect to costs of construction of the new supply facility, any non-owner municipality to whom the Wanaque plant will make North Jersey water available, must bear an "equitable share" of that cost, including the interest on the entire original cost of the project, not merely on that portion of the bonds which may be outstanding. See *N.J.S.A.* 58:5-26.

Petitioner has conceded that it would have to go along with a filtration plant plan, even if it was not tailored exclusively to its own interests, if the plan were devoted to the sole benefit of the partners in North Jersey. But as developed herein, the statutory scheme is not predicated on the narrow self-interest of the partners, nor are North Jersey's responsibilities so bounded. Petitioner must defer to those responsibilities. The statute, however, guarantees absolutely that in meeting the needs of the district North Jersey was created to serve, the owners of North Jersey will not be made to bear any untoward costs. And indeed, the statutory scheme insures that far from costing the owners of North Jersey money, the possible utility of the Wanaque plant in meeting the needs of other municipalities in the supply district can only inure to the financial benefit of Passaic Valley and the other participants in North Jersey.

CONCLUSION

For the reasons aforestated, third-party plaintiff-respondent, North Jersey District Water Supply Commission submits that the Petition for *certiorari* fails to present a viable federal question or any question of public importance. It is further submitted that the decision of the New Jersey Appellate Division from which review is sought is consonant with decisions in this Court. Therefore, it is respectfully urged that the Petition for Certiorari be denied.

Respectfully submitted,
TELTSER and PERLE

By _____
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